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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FRANK STEPHENSON, Defendant and Appellant.	H045719 (San Benito County Super. Ct. No. CR-15-02022)

I. INTRODUCTION

Defendant Frank Stephenson pleaded no contest to transportation of methamphetamine for sale (Health & Saf. Code, § 11379, subd. (a)). The trial court sentenced defendant to the upper term of four years, with the concluding 1,095 days of the term to be served on mandatory supervision. His conditions of mandatory supervision included that he not possess "any weapons," that he not be "adjacent to any school campus," and that he pay a $40 court operations assessment (Pen. Code, § 1465.8) and a $30 court facilities assessment (Gov. Code, § 70373). (Capitalization omitted.)

On appeal, defendant argues the conditions of mandatory supervision prohibiting him from possessing "any weapons" and from being "adjacent to any school campus" are unconstitutionally vague. (Capitalization omitted.) Defendant also contends that payment of the court operations assessment and the court facilities assessment cannot be made a condition of his mandatory supervision.

For reasons we will explain, we will modify the weapon and school campus conditions. We will also modify the judgment to reflect that the court operations assessment and court facilities assessment are separately imposed and are not a condition of defendant's mandatory supervision. As so modified, we will affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Crime*[1]

On October 23, 2015, a deputy with the San Benito County Sheriff's Office saw defendant driving a car down a street. The deputy knew defendant had a suspended driver's license and should not be driving, so he conducted a traffic stop. During the traffic stop, the deputy conducted a pat-search of defendant for weapons. The deputy discovered defendant was in possession of 8.77 grams of methamphetamine. Defendant's wallet contained $242 and his phone contained text messages indicative of drug sales.

B. *The Plea and Sentencing*

On November 20, 2015, a complaint was filed charging defendant with transportation of methamphetamine for sale (Health & Saf. Code, § 11379, subd. (a); count 1), possession of a controlled substance for sale (Health & Saf. Code, § 11378; count 2), and misdemeanor driving while his license was suspended for a prior driving under the influence conviction (Veh. Code, § 14601.2, subd. (a); count 3). As to counts 1 and 2, the complaint further alleged that defendant had served three prior prison terms (Pen. Code, § 667.5, subd. (b)), and that he was on bail or was released on his own recognizance on another felony charge at the time the offenses were committed (Pen. Code, § 12022.1).

[1] As defendant was convicted by plea, the summary of his offense is taken from the probation report, which was based on a report by the San Benito County Sheriff's Department.

On April 20, 2017, defendant pleaded no contest to transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a); count 1) with the understanding that he would receive a four-year jail term with a period of mandatory supervision, and that the remaining counts and allegations would be dismissed or stricken.

On March 1, 2018, the trial court sentenced defendant to a term of four years with a portion of his sentence to be served on mandatory supervision under Penal Code section 1170, subdivision (h)(5)(B).[2] The conditions of mandatory supervision included: "Do not own, possess, have access to, or have under your control ANY weapons, firearms, stun guns or OC (pepper) spray/tear gas. Do not own, have access to, or have under your control any type of instrument or device which a reasonable person would believe to be capable of being used as a firearm or any ammunition which could be used in a firearm; any knife with a blade longer than two inches, except kitchen knives, which must be kept in your residence or knives related to your employment, which may be used and carried only in connection with your employment," and "[d]o not be adjacent to any school campus during school hours, unless you are enrolled or with prior permission of the school administrator or probation." As conditions of his mandatory supervision, defendant was further ordered to pay a $40 court operations assessment (Pen. Code, § 1465.8) and a $30 court facilities assessment (Gov. Code, § 70373).

III. DISCUSSION

Defendant argues the mandatory supervision conditions prohibiting him from owning, possessing, or having access to "any weapon" and being "adjacent" to a school

[2] In his opening brief on appeal, defendant initially argued the trial court made a clerical error by suspending only the concluding 995 days of his sentence instead of the concluding 1,095 days. On July 19, 2018, the trial court filed an amended order suspending the concluding 1,095 days of defendant's sentence. Defendant has withdrawn this argument from his opening brief.

campus are unconstitutionally vague. He also argues that payment of the court operations assessment and the court facilities assessment cannot be made a condition of his mandatory supervision. We will consider each contention in turn after first setting forth general legal principles concerning mandatory supervision conditions.

A. *Legal Principles Governing Mandatory Supervision Conditions*

When a defendant is on mandatory supervision, the defendant must "be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation." (Pen. Code, § 1170, subd. (h)(5)(B).) Although mandatory supervision has been characterized as "akin to probation" (*People v. Griffis* (2013) 212 Cal.App.4th 956, 963, fn. 2), courts have also observed that mandatory supervision is in some respects "more similar to parole than probation" (*People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1423; accord, *People v. Martinez* (2014) 226 Cal.App.4th 759, 763). For that reason, mandatory supervision conditions have been analyzed "under standards analogous to the conditions or parallel to those applied to terms of parole." (*Martinez*, *supra*, at p. 763.) Nonetheless, the standard for analyzing the validity and reasonableness of parole conditions is "the same standard as that developed for probation conditions." (*Id*. at p. 764.) Moreover, it has been stated that "[t]he criteria for assessing the constitutionality of conditions of probation also applies to conditions of parole." (*In re Stevens* (2004) 119 Cal.App.4th 1228, 1233.)

"A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K*. (2007) 40 Cal.4th 875, 890 (*Sheena K.*); *People v. Leon* (2010) 181 Cal.App.4th 943, 948-949 (*Leon*).) In addition, "[a] probation condition 'must be sufficiently precise for the probationer to know what is required of him [or her], and for the court to determine whether the condition has been violated,' if it is to withstand a [constitutional] challenge on the ground of vagueness." (*Sheena K.*, *supra*, at p. 890; *Leon*, *supra*, at p. 949.)

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.] The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' [citation], protections that are 'embodied in the due process clauses of the federal and California Constitutions. [Citations.]' [Citation.] The vagueness doctrine bars enforcement of ' "a statute which either forbids or requires the doing of an act in terms so vague that men [and women] of common intelligence must necessarily guess at its meaning and differ as to its application." [Citation.]' [Citation.] A vague law 'not only fails to provide adequate notice to those who must observe its strictures, but also "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [Citation.]' [Citation.] In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that 'abstract legal commands must be applied in a specific *context*,' and that, although not admitting of 'mathematical certainty,' the language used must have ' "*reasonable* specificity." ' " (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

Defendant did not object to these challenged conditions below. However, the forfeiture rule does not apply when a probation condition is challenged as unconstitutionally vague on its face and the claim can be resolved on appeal as a pure question of law without reference to the sentencing record. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 887-889; see also *Leon*, *supra*, 181 Cal.App.4th at p. 949.)

B. *The Weapons Condition*

The trial court ordered the following condition of mandatory supervision: "Do not own, possess, have access to, or have under your control ANY weapons, firearms, stun guns or OC (pepper) spray/tear gas. Do not own, have access to, or have under your control any type of instrument or device which a reasonable person would believe to be capable of being used as a firearm or any ammunition which could be used in a firearm;

any knife with a blade longer than two inches, except kitchen knives, which must be kept in your residence or knives related to your employment, which may be used and carried only in connection with your employment." Defendant argues this condition is unconstitutionally vague, because the term "any weapons" is not sufficiently precise even in the context of the condition as a whole.

The Attorney General disagrees, arguing that the phrase "any weapons" is clarified and limited by the list of prohibited items that immediately follows. We do not agree with the Attorney General's interpretation. Although the challenged condition lists "firearms, stun guns, or OC (pepper) spray/tear gas" and other items as also prohibited, it does not expressly state that the term "any weapons" is meant to include these items. Nor does the condition's description of prohibited firearms and knives offer any clarification over what "any weapons" entails. As worded, the term "any weapons" is not limited by the additional items described in the condition.

As a result, we determine the mandatory supervision condition is vague with respect to prohibiting possession of "any weapons." As is, the condition does not adequately identify the items that may fall within the prohibition.

Defendant argues that we should strike the condition and remand the matter to the trial court so that it may formulate a more adequately clear and specific condition. (See *People v. Contreras* (2015) 237 Cal.App.4th 868, 889 [remanding matter to trial court to fashion a more precise probation condition after finding condition prohibiting access, use, or possession of police scanner device or surveillance equipment unconstitutionally vague].)

We disagree with defendant's suggested procedure and believe modification of the condition will ameliorate any constitutional concerns and would be in the interests of judicial economy. In *In re R.P.* (2009) 176 Cal.App.4th 562, the appellate court considered whether a probation condition prohibiting possession of any " 'dangerous or deadly weapon' " was unconstitutionally vague. (*Id.* at p. 565.)

After examining statutory authority, case law, jury instructions, and Black's Law Dictionary, the appellate court concluded as follows: "legal definitions of 'deadly or dangerous weapon,' 'deadly weapon,' 'dangerous weapon,' and use in a 'dangerous or deadly' manner, consistently include the harmful capability of the item and the intent of its user to inflict, or threaten to inflict, great bodily injury. As a result of these well-defined terms, the phrase 'dangerous or deadly weapon' is clearly established in the law. Accordingly, the 'no-dangerous-or-deadly-weapon' probation condition is sufficiently precise for [the minor] to know what is required of him." (*Id.* at p. 568.) Here, defendant cites *R.P.* in his opening and reply briefs and argues that *R.P.*'s specification that a weapon be "dangerous or deadly" is "precisely the qualification [that] is absent from the condition here and which renders it vague."

Accordingly, we shall modify the probation condition to state that defendant shall not own, possess, or have access to "any dangerous or deadly weapons."

C. *The School Campus Condition*

Defendant was ordered "not [to] be adjacent to any school campus during school hours, unless you are enrolled or with prior permission of the school administrator or probation." Defendant argues that this condition is unconstitutionally vague, because the term "adjacent" is not sufficiently well-defined. The Attorney General concedes that modification of the condition is necessary to specify a distance, and we find this concession appropriate.

Appellate courts have considered similarly worded conditions and have found them to be unconstitutionally vague. In *People v. Rhinehart* (2018) 20 Cal.App.5th 1123 (*Rhinehart*), the appellate court concluded modification of a probation condition prohibiting a defendant from being " 'adjacent to' " a school campus required modification to specify a distance. (*Id.* at p. 1130.)

In part, *Rhinehart* relied on *People v. Barajas* (2011) 198 Cal.App.4th 748 (*Barajas*). In *Barajas*, the defendant challenged as impermissibly vague and overbroad a

probation condition similar to the one challenged here. The probation condition in *Barajas* stated: " 'You're not to be adjacent to any school campus during school hours unless you're enrolled in or with prior permission of the school administrator or probation officer.' " (*Id*. at p. 760.) This court agreed that the probation condition was vague, explaining: "At a sufficient distance, most reasonable people would agree that items are no longer adjacent, but where to draw the line in the continuum from adjacent to distant is subject to the interpretation of every individual probation officer charged with enforcing this condition. . . . To avoid inviting arbitrary enforcement and to provide fair warning of what locations should be avoided, we conclude that the probation condition requires modification." (*Id*. at p. 761.)

The Attorney General in *Barajas* proposed modifying the probation condition to include the following language: " 'Do not knowingly be on or within 50 feet of a school campus . . . .' " (*Barajas*, *supra*, 198 Cal.App.4th at p. 761.) This court agreed that a 50-foot distance restriction would provide the defendant with "sufficient guidance" (*id*. at p. 762), and modified the condition to state: " 'You're not to knowingly be on or within 50 feet of any school campus during school hours unless you're enrolled in it or with prior permission of the school administrator or probation officer' " (*id*. at p. 763). This court also stated the following: "While accepting the Attorney General's concession in this case, we recognize that other modifications may equally solve the problem we perceive, such as a different measure of distance (e.g., '30 feet,' '20 yards'), a different measure of physical proximity (e.g., 'on' or 'one block away') or otherwise mapping restricted areas (e.g., 'the 1200 block of Main Street'). We do not intend to suggest that a 50-foot distance is a constitutional threshold." (*Id*. at p. 762, fn. 10.)

Consistent with *Rhinehart* and *Barajas*, we determine that the mandatory supervision condition requires modification to prevent arbitrary enforcement and to provide fair warning to the defendant of locations to be avoided. (*Rhinehart*, *supra*, 20 Cal.App.5th at p. 1130; *Barajas*, *supra*, 198 Cal.App.4th at p. 761.) Defendant urges us

to either modify the condition or remand the matter back to the trial court. Because both parties agree that a distance should be specified, and because both parties cite *Barajas* without objection to the 50-foot distance applied in that case, we will modify the mandatory supervision condition in this case similarly to state: "Do not be on or within 50 feet of any school campus during school hours, unless you are enrolled or with prior permission of the school administrator or probation."

D. *The Court Operations and Court Facilities Assessments*

Lastly, defendant argues the trial court erroneously imposed a $40 court operations assessment (Pen. Code, § 1465.8) and a $30 court facilities assessment (Gov. Code, § 70373) as conditions of his mandatory supervision. Defendant claims that including these two assessments as conditions of mandatory supervision constitutes an unauthorized sentence. The Attorney General agrees that the trial court erroneously imposed these two assessments as conditions of defendant's mandatory supervision and does not oppose clarifying the judgment to reflect that the two assessments are imposed by a separate order. We agree with defendant and the Attorney General that the judgment requires modification.

In *People v. Pacheco* (2010) 187 Cal.App.4th 1392, disapproved on other grounds as stated in *People v. McCullough* (2013) 56 Cal.4th 589, 599, and *People v. Trujillo* (2015) 60 Cal.4th 850, 858 and footnote 5, this court determined that a court security fee (now known as a court operations assessment) imposed under Penal Code section 1465.8 is collateral to a defendant's crimes and punishment and, as such, cannot be made a condition of probation. (*Pacheco*, *supra*, at p. 1402.) We extended the reasoning in *Pacheco* to court facilities assessments imposed under Government Code section 70373 in *People v. Kim* (2011) 193 Cal.App.4th 836, 843 and held that those assessments also cannot be made a condition of probation.

Here, defendant was not sentenced to probation but to mandatory supervision under Penal Code section 1170, subdivision (h)(5)(B). Penal Code section 1170,

subdivision (h)(5)(B) provides that a defendant "shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation." Under *Pacheco* and *Kim*, a court operations assessment and a court facilities assessment cannot be made conditions of probation. Thus, we find they also cannot be imposed as conditions of mandatory supervision.

We therefore modify the judgment to reflect that the court operations assessment and court facilities assessment are separate orders.

III. DISPOSITION

The judgment is ordered modified as follows. The mandatory supervision condition prohibiting ownership of, possession of, or access to any weapons is modified to state: "Do not own, possess, have access to, or have under your control any dangerous or deadly weapons, firearms, stun guns or OC (pepper) spray/tear gas. Do not own, have access to, or have under your control any type of instrument or device which a reasonable person would believe to be capable of being used as a firearm or any ammunition which could be used in a firearm; any knife with a blade longer than two inches, except kitchen knives, which must be kept in your residence or knives related to your employment, which may be used and carried only in connection with your employment." The mandatory supervision condition limiting access to school campuses is modified to state: "Do not be on or within 50 feet of any school campus during school hours, unless you are enrolled or with prior permission of the school administrator or probation."

The order to pay the $40 court operations assessment (Pen. Code, § 1465.8) and the $30 court facilities assessment (Gov. Code, § 70373) as conditions of mandatory supervision is deleted and imposed as a separate order.

As modified, the judgment is affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

DANNER, J.

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